Office-Supreme Court, U.S.
FILED
SEP 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-128

In the Supreme Court of the United States

OCTOBER TERM, 1980

LYON & RYAN FORD, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner voluntarily recognized the Union and therefore violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and refusing to bargain with it.

2. Whether the Board properly ordered backpay for six unlawfully discharged strikers from the dates of their discharges.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 647 F. 2d 745. The decision and order of the National Labor Relations Board (Pet. Apps. B and C) are reported at 246 N.L.R.B. No. 2.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1981. The petition for a writ of certiorari was filed on July 21, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set out in the petition (Pet. App. D).

STATEMENT

1. In August 1978, the Union[1] obtained authorization cards and applications for Union membership from a majority of the Company's employees. Thereafter, on August 24, 1978, Union business representatives Donald Carlson and Ed Vaughn presented these cards and applications to Company president Larry Ryan. At the same meeting, they gave Ryan a copy of a letter stating that a majority of the Company's "mechanics, semi-skilled and apprentices, bodymen and painters" had designated the Union as their bargaining agent. The letter also demanded that the Company recognize the Union as bargaining representative of those employees and begin negotiations with the Union for a collective bargaining agreement. During this meeting, the scope of the proposed bargaining unit was discussed and clarified; Ryan examined each of the Union authorization cards and membership applications; and Ryan inspected a copy of the recently expired master contract for the Chicago area and a list of changes that would be included in the new master contract. Carlson briefly explained several provisions of the master contract, reviewed the wage scale, and answered Ryan's specific questions concerning the cost of welfare and pension provisions and the extent of the Union's insurance coverage (Pet. App. C-3 to C-7 & n.2).

When Carlson, Vaughn and Ryan met again four days later, they were joined by Patrick Ryan—Larry Ryan's son and general manager of the Company. The parties again discussed the terms of the master contract. When it was noted that the Company's vacation policy was more generous than the one provided in the master contract, Carlson stated that he would "take the good with the bad" and go with the master contract. The parties then discussed the

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[1]Automobile Mechanics Local 701, International Association of Machinists and Aerospace Workers, AFL-CIO.

job classifications of specific employees. When they were unable to settle on the classification of two of the Company's employees, Carlson requested another meeting. At the close of the meeting, Carlson was permitted to go into the shop and talk to some of the employees (Pet. App. C-8 to C-10).

Later that day and the following day, Patrick Ryan interrogated two employees about Union sympathies and asked if more money would make the difference (Pet. App. C-12 to C-13 & n.3).

On September 1, when Carlson and Vaughn arrived for a scheduled meeting, Larry Ryan stated that he wanted a "Federal election." Carlson responded that he was disappointed with that decision because he thought that everything had been going along fine with the exception of whether to include two employees in the unit. Carlson pointed out that Ryan had seen all the Union authorization cards and applications and had discussed the contract and classifications. He added that if a contract were not signed by September 12 there would be a work stoppage (Pet. App. C-10 to C-11).

No contract was signed, and on September 12, 11 employees began picketing the Company (Pet. App. C-11). During October, the Company sent the following letter to six of the striking employees (*id.* at C-12):

> This letter is to inform you that effective _____ we have hired an individual who will replace you on our work force. Accordingly it will not be our intention to recall you to work at the conclusion of our labor dispute, in as much as the new employee will be taking your place.

2. The Board agreed with the administrative law judge's conclusions that the Union had represented a majority of the employees in an appropriate unit when it requested

recognition on August 24, 1978; that the Union had satisfactorily demonstrated its majority status to Larry Ryan on August 24; that Ryan had recognized the Union as majority representative for the unit employees on August 24, had engaged in discussions and negotiations concerning terms of the proposed contract with the Union on that date and other occasions; and that, therefore, the Company had violated Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), by withdrawing recognition from the Union and refusing to bargain with it on September 1, 1978. The Board further found that the strike that began on September 12, 1978, resulted directly from the Company's withdrawal of recognition and was, therefore, an unfair labor practice strike. Accordingly, the Board found that the Company had violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by discharging six employees because of their involvement in the unfair labor practice strike. Finally, the Board found that the Company had violated Section 8(a)(1) by interrogating two employees about their Union sympathies (Pet. App. B-2, C-24 to C-31).[2]

In accordance with its policy announced in *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 27, enforcement denied on other grounds, 612 F. 2d 6 (1st Cir. 1979), the Board ordered the Company to reinstate the six unlawfully discharged strikers with backpay running from the dates of their discharges, rather than from the dates on which they had requested reinstatement (if any), as had been the Board's previous policy (Pet. App. B-2 to B-3, C-35 to C-36 & n.18).

3. The court of appeals upheld the decision of the Board and enforced its order (Pet. App. A-1 to A-22). The court

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[2]This finding was neither contested in the court of appeals (Pet. App. A-7) nor challenged in the petition.

found the Board's conclusion that petitioner had voluntarily recognized the Union to be supported by substantial evidence (Pet. App. A-8 to A-14). The court also upheld the Board's policy whereby "an unlawfully discharged striker is no longer required to request reinstatement to trigger an employer's backpay obligation" (*id.* at A-18). It rejected the Company's assertion that the new policy was "onerous" (*id.* at A-19):

> As in the case of any discharged employee, the employer must make an offer of reinstatement. If the striking employee thereafter refuses to return to work, the employer's position is vindicated and his backpay obligation is tolled. When the employee willfully withholds his services, the employer is thus not responsible for his corresponding loss of earnings. Even where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made.

Finally, the court rejected the Company's contention that the *Abilities & Goodwill* remedy should not have been applied retroactively to it. Relying on the standard enunciated in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), the court concluded (Pet. App. A-21) that

> the new rule was not an unforeshadowed departure from the Board's previously existing practice, and the Board has sufficiently demonstrated a basis for its view that retroactive application will further rather than retard the operation of the rule. In addition, retroactive application will not create substantial injustice or undue hardship for either party.

ARGUMENT

1. An employer that has not committed unfair labor practices has the right to require an election regardless of a union's demonstrating majority status by other evidence,

such as by authorization cards. *Linden Lumber Division, Summer & Co.* v. *NLRB*, 419 U.S. 301, 310 (1974). The Board and the court of appeals agree, however, that once an employer commits itself to recognizing and bargaining with a union based on a showing of majority support by such other evidence, the employer may not renege on that commitment and insist upon an election. See, *e.g.*, *NLRB* v. *Brown & Connolly, Inc.*, 593 F. 2d 1373, 1374 (1st Cir. 1979); *NLRB* v. *Broadmoor Lumber Co.*, 578 F. 2d 238, 242 (9th Cir. 1978); *NLRB* v. *A. Lasaponara & Sons, Inc.*, 541 F. 2d 992, 995 (2d Cir. 1976), cert. denied, 430 U.S. 914 (1977); *Toltec Metals, Inc.* v. *NLRB*, 490 F. 2d 1122 (3d Cir. 1974); *Jerr-Dan Corp.*, 237 N.L.R.B. 302 (1978), enforced, 601 F. 2d 575 (3d Cir. 1979); cf. *NLRB* v. *Gogin*, 575 F. 2d 596, 605 (7th Cir. 1978).

Petitioner asserts (Pet. 24-30), however, that it did not voluntarily recognize the Union and that the Board, upheld by the court of appeals, improperly based its contrary finding on the fact that petitioner agreed to look at the authorization cards tendered by the Union. There is no merit to this contention. The finding that petitioner voluntarily agreed to recognize the Union was not based solely on Larry Ryan's perusal of the cards. As the court of appeals noted (Pet. App. A-9):

> At [the] initial meeting with Union representatives, Ryan also examined a copy of the proposed contract and discussed various contractual provisions. He voiced no objection to the Union as a properly designated bargaining representative, and negotiations continued at a second meeting several days later, in which the parties compared Union contractual provisions with current company policy and considered the job classification of employees within the proposed bargaining unit. After scheduling a third meeting to settle differences over the inclusion of two employees in the

> bargaining unit, Larry Ryan gave the Union representatives permission to speak to employees during working hours. This course of conduct is consistent with, and indicative of, the commitment necessary to create a bargaining relationship and warranted a finding by the Board that the Company had recognized the Union as the employees' bargaining agent.

Thus, contrary to petitioner's contention, this is not a case of an employer being entrapped into recognizing a union merely because of an equivocal reaction to a recognition demand based on authorization cards.

Accordingly, the first question presented is merely whether the court of appeals properly found that substantial evidence supported the Board's finding that petitioner's conduct constituted voluntary recognition of the Union. That issue, which turns on the facts of this particular case, does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 492-493 (1951). In any event, as shown above (pages 2-3), the record amply supports the Board's affirmative conclusion.

2. There is no merit to petitioner's additional contention (Pet. 31-39) that the Board improperly ordered the Company to reinstate six unlawfully discharged strikers with backpay computed from the dates of their discharges. The Board's order was well within its broad discretion to "devis[e] remedies to effectuate the policies of the Act." *NLRB* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953); see *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941); cf. *NLRB* v. *Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969). The Board's order also is consistent with the view of this Court expressed in *NLRB* v. *International Van Lines*, 409 U.S. 48, 53 (1972), that employees victimized by employer unfair labor practices are not to be deprived of an appropriate remedy because they are strikers. Moreover,

the decision of the court of appeals upholding the Board's order creates no conflict among the circuits. In these circumstances, further review by this Court is unwarranted.

a. In *Abilities & Goodwill, Inc.*, 241 N.L.R.B. 27, enforcement denied on other grounds, 612 F. 2d 6 (1st Cir. 1979), the Board determined to treat unlawfully discharged strikers in the same manner as any other discriminatorily discharged employee for the purpose of computing backpay. Accordingly, it held that an unlawfully discharged striker no longer would be required to request reinstatement in order to trigger an employer's backpay obligation. As the Board observed (241 N.L.R.B. at 27-28), a discriminatorily discharged employee never has been required to request reinstatement because such a request by an employee, having just been fired by his employer, would be futile. The Board found this rationale equally applicable to an employer's discharge of a striker, which—like the termination of any other employee—effectively notifies him that his services are no longer desired. In addition, because it is the employer who has acted unlawfully, the burden properly is placed on the wrongdoer to remedy its unfair labor practice by offering the victim immediate and full reinstatement. This rationale, too, is, as the Board explained in *Abilities & Goodwill, supra*, 241 N.L.R.B. at 27, equally applicable to unlawfully discharged strikers, since "there is nothing peculiar to a strike which justifies dissimilar treatment. The nature of the employer's unlawful conduct is not changed by the fact that the employee happens to be a striker at the time of discharge."

There is no merit to petitioner's contention (Pet. 32) that under the *Abilities & Goodwill* rule, "the employer will be forced to pay the employees for all the time that they are on strike * * * even if they would have continued to refuse to work if they had not been discharged." As the Board

pointed out (*Abilities & Goodwill, supra*, 241 N.L.R.B. at 27), the employer can easily resolve any ambiguity concerning whether the employees are on strike by advising them that it is rescinding those discharges and offering them reinstatement. At that point, any uncertainty is eliminated; if an employee refuses to report to work, "it becomes clear that the discriminatee wishes to resume the status of striker; and the employer's backpay obligation, if any, is tolled" (*ibid.*). Moreover, as the court of appeals noted (Pet. App. A-19), "[e]ven where an employer fails to offer reinstatement, he is entitled to reduce his backpay liability by presenting evidence that the employee would have refused the reinstatement offer had it been made."

b. Nor is there merit to petitioner's contention (Pet. 37-39) that the Board's retroactive application of the *Abilities & Goodwill* remedy to it raises an issue warranting review by this Court. Applying the test established by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971), the court below found retroactivity appropriate here because the *Abilities & Goodwill* remedy "rectifies an apparent disparity in the treatment of discharged employees [and] was also not an unforeshadowed departure by the Board from its prior line of decisions" (Pet. App. A-20).

Petitioner asserts (Pet. 38-39) that the court of appeals erred in concluding that the new rule was "foreshadowed" within the meaning of *Chevron*, arguing (Pet. 39) that the change was an "abrupt change of policy" caused by "a change of membership on the Board." However, as the court of appeals correctly noted (Pet. App. A-19 to A-20; emphasis in original), the *Abilities & Goodwill* remedy

> is not so much an abrupt departure from Board precedent as it is the natural evolution of the Board's efforts over the years to achieve a "just result." Several years prior to *Abilities & Goodwill*, the Board created a

> futility exception to the reinstatement rule for discharged strikers. Under this exception, if evidence indicated that a request for reinstatement would be futile, the striker was entitled to reinstatement with backpay even if no request had been made. * * * It was neither unreasonable nor unforeseeable that the Board should elect to extend this exception by creating a presumption of apparent finality of discharge in strike situations. It would appear to be a rare case where a reinstatement request by a striking employee who had just been fired would *not* be futile. Since the backpay award for unlawfully discharged working employees is based on an identical presumption of futility, the reasons for distinguishing logically between the two situations tend to disappear.

Moreover, petitioner nowhere challenges the court of appeals' finding (Pet. App. A-21) that retroactive application creates no "substantial injustice or undue hardship." In these circumstances, retroactive application was clearly appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

DOJ-1981-09